In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 516

IRWIN IRA MESSINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1969. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including August 29, 1969, and, on August 25,

1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied due process by virtue of the procedures followed by the Department of Justice in reviewing his conscientious objector claim and the contents and form of its recommendation to the appeal board that the claim be denied.

2. Whether petitioner was denied a fair trial by the conduct of the judge at his jury-waived trial.

STATEMENT

After a jury-waived trial in the United States District Court for the Eastern District of New York, petitioner was convicted of wilfully and knowingly failing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. (Supp. IV) 462. On February 3, 1969, he was sentenced to imprisonment for a period of three years.

Petitioner registered with the Selective Service System in 1963.[1] On February 4, 1964, petitioner completed a classification questionnaire sent to him by his local board. He did not sign Series VIII of the questionnaire entitled "Conscientious Objector", and did not claim any exemption as a conscientious objector. On February 19, 1964, he was classified I-A by his local board. (R. 36-38)

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[1] The relevant facts are set forth in greater detail in the opinion of the district court (See Pet. App. 12a-46a) and are summarized in th opinion of the court of appeals (See Pet. App. 1a-7a).

In January, 1965, petitioner responded to a current information questionnaire by indicating that he was no longer in attendance at college but would be a part time student starting in February 1965, at a community college, but made no statement pertaining to conscientious objection. On April 21, 1965, he was classified 2-S, the student deferment classification (R. 38).

After failing to return a current information questionnaire sent him in November, 1965, petitioner was classified I-A and ordered to report for a physical examination (R. 39-40). Petitioner then wrote to his local board appealing his I-A classification on the ground that he had changed his status from that of full time to part-time student because he had to work to pay for his education and that he intended to become a full-time student in February, 1966. The letter contained no indication that he considered himself a conscientious objector. (R. 42-44)

At the end of December 1965, petitioner completed another current information questionnaire in which he made no mention of conscientious objection. In pressing his claim for a student deferment he stated "I very much want to finish my schooling before going into the service." (R. 441)

On January 25, 1966, the Appeal Board unanimously affirmed petitioner's I-A classification (R. 46). On February 9, 1966, petitioner informed his local board that he was a full time night student at a community college. The following week petitioner was mailed an order to report for induction on March 2, 1966. The local board, however, rescinded

that order *sua sponte* and reclassified petitioner I-S (c), a classification which permits a registrant to finish the school term before his call up for military service (R. 50-52).

In May 1966, petitioner completed a third current information questionnaire in which he again failed to mention any claim to conscientious objector status. He was reclassified I-A in June and wrote to request a personal appearance on the ground that he would be a full time student in the fall. After petitioner had appeared personally before the local board, it affirmed his I-A classification. On August 16, 1966, the appeal board upheld the local board's classification. The classification was appealed to the national selective service appeal board which affirmed the local board's action on October 13, 1966 (R. 53-73).

In August 1966, after the appeal board had acted, but prior to the decision of the national selective service appeal board, petitioner wrote to his local board requesting a conscientious objector form. He stated in his letter:

> I would like to request a conscientious objector form due to the fact that I will not be getting my student deferment. I felt it would be no need to express my beliefs regarding this matter of fighting and war if I had my student deferment. That is the reason I had never requested this status before, but now it is necessary for me to do so (R. 425).

Petitioner was sent such a form which he completed and returned to his local board. In this form petitioner stated that he was opposed to war in any

form because of his religious training and belief; that he claimed exemption from both combatant and noncombatant training; that his view derived from his Jewish background; and that he had acquired his conscientious objection convictions "some ten years ago" (Pet. App. 5a).

On November 15, 1966, after reviewing the completed form, the local board unanimously determined that the information submitted in the form did not warrant a change in his classification (R. 77-79). On November 22, 1966, the local board received a letter from petitioner in which he requested a personal appearance and stated in pertinent part:

> * * * I was a conscientious objector to war and killing since I can remember but had not gone through the trouble of filing Form SS 150 before because I thought I would have my student deferment (R. 80).

After petitioner's appearance on January 10, 1967, the local board affirmed his I-A classification and petitioner appealed to his appeal board.

In January, 1967, under procedures then in effect (50 U.S.C. App. 456(j)),[2] the appeal board tentatively determined to reject petitioner's claim to conscientious objection, 1-O status. His file was then sent to the Justice Department for its advisory recommendation. Prior to a hearing, the

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[2] In 1967, the Act was amended to eliminate Department of Justice participation in the consideration of conscientious objector claims in the administrative appeal process. See Act of June 30, 1967, 81 Stat. 100, 104, 50 U.S.C. App. (Supp. IV) 456(j).

F.B.I. conducted an inquiry and a resume of the F.B.I. report was given to petitioner and the report was given to the hearing examiner (R. 88-94). This report contained, *inter alia*, a summary of a letter written by petitioner to Adelphi College on August 25, 1963, which stated "only at the time of writing of this letter did the registrant begin to realize that his life would be ruined if he had to go into the Army." (Pet. App. 21a, 49a). Petitioner sent the hearing officer a letter to refute some of the points in the resume (Pet. App. 6a).

After holding the hearing on August 29, 1967, the hearing officer wrote a two-page report in which he found petitioner to be sincere and recommended that he be reclassified as a conscientious objector (Pet. App. 51a-52a). However, in making the recommendation of the Department of Justice to the appeal board, the chief of the Department's conscientious objector section rejected the hearing examiner's conclusion that petitioner was sincere. The Department's letter to the appeal board emphasized petitioner's long delay in asserting his conscientious objector claim despite petitioner's own statement that his views had originated some ten years before; that petitioner's sincerity was questioned throughout the F.B.I. resume of inquiry; that despite petitioner's claims to the contrary his beliefs were politically rather than religiously motivated. The Department of Justice therefore recommended that petitioner not be reclassified in I-O or in I-A-O (Pet. App. 47a-50a). The resume of the F.B.I. report was sent to the appeal board. Neither a copy of the complete F.B.I.

report nor the hearing examiner's report were sent to the appeal board. Petitioner wrote a letter to his appeal board in support of his claim to conscientious objector status after receiving a copy of the Department of Justice recommendation. The apeal board reaffirmed petitioner's classification as I-A (R. 110, 241).

Petitioner was ordered to report for induction on March 20, 1968, by his local board. He reported to the induction center but refused to submit to induction.

ARGUMENT

Each of the allegations of error presently raised in the petition was fully canvassed and rejected by the court of appeals (Pet. App. 2a-11a).

1. Petitioner's principal contentions are that the procedures followed by the Department of Justice in this case in reviewing his conscientious objection claim and submitting its conclusions to the appeal board constituted a denial of due process (See Pet. 8-12). As the court of appeals pointed out, however, the Department of Justice was not barred from reversing its hearing officer (see *Gonzales* v. *United States*, 364 U.S. 59, 63) and the information contained in both petitioner's file and the F.B.I. report supplied ample justification for the Department's finding that petitioner was insincere.

The alleged legal error in the body of the Department of Justice's recommendation, regarding the religious basis necessary to support a conscientious objection claim (see Pet. 10-11), was as the court of appeals held in no way prejudicial. The Department's

recommendation was not based on a finding that petitioner failed to satisfy the legal criteria for conscientious objector status, but rather constituted a finding that petitioner was insincere in his beliefs. Moreover, two of the appeal board's members testified at trial that they rejected petitioner's conscientious objector's claim because they believed him to be insincere.

Nor did the fact that the appeal board did not have a copy of the hearing examiner's report prejudice petitioner. The report was accurately summarized in the Department's recommendation (Pet. App. 48a-49a).[3]

We note further that, by statutory amendment, the Department no longer participates in reviewing conscientious objector claims and therefore contentions of error in its procedures do not raise issues which will have continuing or recurring significance.

2. Petitioner's final contention—that he was denied due process of law by the manner in which the trial court conducted his jury-waived trial—essentially rests on the argument that the trial judge cross-examined him in some detail. However, an examination of both the record and the lengthy opinion and findings of fact by the district judge (Pet. App. 12a-46a) discloses that the active role of the judge

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[3] The views expressed by the court of appeals in this case concerning the procedures followed by the Department of Justice in reviewing conscientious objector claims are in accord with the views recently expressed by the Fourth Circuit in *Pritchard* v. *United States*, No. 12,974, decided June 23, 1969, petition for a writ of certiorari pending No. 636 Misc., this Term.

at the trial was properly designed fully to develop the facts in this non-jury case. Cf. *Stuckey* v. *Andrews*, 249 F. 2d 828, 830 (C.A. 5); *La Barge Water Well Supply Co.* v. *United States*, 325 F. 2d 798, 801-802 (C.A. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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